

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 29 June 2004**

Case No. 2003-BLA-6044

In the Matter of:  
JOHN BALL,  
Claimant,

v.

EASTERN COAL CORPORATION,  
c/o ACCORDIA EMPLOYERS SERVICE,  
Employer,

and

PITTSTON COMPANY,  
Self-Insurer,

and

DIRECTOR, OFFICE OF WORKERS'  
COMPENSATION PROGRAMS,  
Party-in-Interest.

BEFORE: Administrative Law Judge  
Thomas F. Phalen, Jr.

**ORDER REMANDING CLAIM**

This is an order arising out of a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1977, 30 U.S.C. §§ 901-962, ("the Act") and the regulations thereunder, located in Title 20 of the Code of Federal Regulations. Regulation section numbers mentioned in this Order refer to sections of that Title.<sup>1</sup>

On June 10, 2003, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs, for a hearing. On December 17, 2003, the formal hearing that had been scheduled for March 24, 2004 was continued at the request of Claimant's counsel.

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<sup>1</sup> The Department of Labor amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80, 045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). On August 9, 2001, the United States District Court for the District of Columbia issued a Memorandum and Order upholding the validity of the new regulations. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

## **DISCUSSION AND APPLICABLE LAW**

When a claim is before the District Director, Office of Workers' Compensation Programs, one of its primary adjudicatory responsibilities involves the development of medical evidence. § 725.401. The development of medical evidence typically begins with the Department of Labor sponsored complete pulmonary evaluation. "The Act requires the Department to provide each miner who applies for benefits with the opportunity to undergo a complete pulmonary evaluation at no expense to the miner." § 725.406(a). "A complete pulmonary evaluation includes a report of physical examination, a pulmonary function study, a chest roentgenogram, and, unless medically contraindicated, a blood gas study. *Id.* The Act mandates that the District Director shall schedule the miner for further examination and testing when "any medical examination or test conducted under [§ 725.406(a)] is not administered or reported in substantial compliance with the provisions of part 718 of this subchapter, or does not provide sufficient information to allow the district director to decide whether the miner is eligible for benefits." § 725.406(c). The District Director is empowered to have any component of the physical examination or test reviewed by a physician selected by the District Director to determine whether the examination or test was administered and reported in substantial compliance with the provisions of Part 718. *Id.*

Reviewing courts have added to the District Director's adjudicatory burden, requiring that a complete and credible pulmonary evaluation be provided at the Department's expense that is sufficient to constitute an opportunity to substantiate a claim for benefits. *See Petry v. Director, OWCP*, 14 B.L.R. 1-098, 1-100 (1990)(*en banc*); *see also Newman v. Director, OWCP*, 7 B.L.R. 2-25, 2-31, 745 F.2d 1161 (8<sup>th</sup> Cir. 1984); *Prokes v. Mathews*, 559 F.2d 1057, 1063 (6<sup>th</sup> Cir. 1977). Recently, in an unpublished opinion, the District Director seemingly added to its adjudicatory burden under § 725.406(b) when it argued in its brief to the Benefits Review Board that:

[i]n these circumstances, where the administrative law judge has found that the medical evidence fails to credibly address an essential element of entitlement, the Director maintains that DOL's statutory obligation to provide claimant with a complete and credible pulmonary evaluation sufficient to constitute an opportunity to substantiate his claim as required by the Act and regulations has not been satisfied. 30 U.S.C. § 923(b); 20 C.F.R. § 718.101, 725.401, 725.405(b); *see Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Hodges*, 18 BLR 1-84; *Petry v. Director, OWCP*, 14 BLR 1-98 (1990)(*en banc*).

*See Potter v. Southern Ohio Coal Co.*, BRB No. 03-0637 BLA, page 4 (April 29, 2004)(unpublished). The circumstances the District Director referred to involved the administrative law judge's finding that the physician who provided the Department sponsored examination did not produce a medical report that contained a reasoned and documented opinion relating to the issues under §§ 718.202(a)(4), 718.204(b)(2)(iv), or 718.204(c). *Id.* The Benefits Review Board agreed with the District Director's characterization of its adjudicatory burden under § 725.406, vacated the administrative law judge's denial of benefits, and remanded the claim directly to the District Director for further development of the evidence. *Id.*

In two other recent cases issued by the Board, the District Director conceded that it did not fulfill its statutory duty under § 725.406 because the medical reports rendered by the Department provided physician were determined to be poorly reasoned and documented on the issues of §§718.202(a)(4) and 718.204(b)(2)(iv). See *Little v. Director, OWCP*, BRB No. 03-0786 BLA (April 29, 2004)(unpublished); see also *Hoskins v. Lewis & Lewis Coal Co.*, BRB No. 04-0430 BLA (April 30, 2004)(unpublished). In both cases, the District Director requested that the claim on review before the Benefits Review Board be remanded directly to the District Director so that it could provide the claimants with a complete pulmonary evaluation. In light of the Director's concessions, the Board vacated the decisions and orders of the administrative law judges and remanded the claims to the District Director to "secure a medical report of a complete, credible pulmonary examination provided by the Department of Labor." *Hoskins*, p. 3.

It is clear that the District Director and the Benefits Review Board consider § 725.406 to require the District Director to provide a claimant with a complete and credible pulmonary evaluation that is sufficient to constitute an opportunity to substantiate a claim for benefits under the Act. If the physician who performed the Department sponsored pulmonary evaluation renders a narrative medical report that fails to credibly address any element of entitlement, the District Director and the Board would find that the District Director failed to meet its adjudicatory duty under § 725.406.

Under § 725.421, the District Director may only refer a claim for a formal hearing before the Office of the Administrative Law Judges after the Director has completed evidentiary development and an adjudication occurred without having resolved all contested issues. §725.421(a). If the District Director has not provided the claimant with a complete and credible pulmonary evaluation sufficient to constitute an opportunity to substantiate a claim for benefits under the Act, then the District Director may not refer a claim for a formal hearing. When a claim for benefits is transferred to the Office of the Administrative Law Judges for a formal hearing, the following will typically occur: (1) the claim will be set for a formal hearing; (2) it will undergo the evidentiary development process in anticipation of the formal hearing; (3) the claim will proceed to a formal hearing; (4) a decision and order will be issued by an administrative law judge; and (5) the decision and order may be appealed to the Benefits Review Board. If the claim reaches the Benefits Review Board and the District Director concedes that it did not meet its adjudicatory burden under § 725.406 or the Benefits Review Board finds that the District Director did not meet its adjudicator burden under § 725.406, then the Benefits Review Board will vacate the decision and order and remand the claim to the District Director to provide a complete pulmonary evaluation. This is a tremendous waste of time and resources. Such a result may also violate the putative responsible operator's procedural due process rights. Following an outcome like this, it is conceivable that the putative responsible operator would file a motion to transfer liability to the Black Lung Disability Trust Fund since it had spent considerable time and resources defending against a claim for benefits only to have a successful defense negated and the entire process re-started. This outcome is far from ideal and may not be tolerated.

An administrative law judge possesses the general adjudicatory power to do all other things necessary to enable an administrative law judge to discharge the duties of the office. See § 725.352(b)(5). In the interests of judicial economy and the notion of fair play and substantial

justice, the undersigned administrative law judge has conducted a review of the objective tests conducted and the narrative medical report produced by the Department sponsored complete pulmonary evaluation to determine if the District Director has met its adjudicatory burden under §725.406.

Claimant selected Imtiaz Hussain, M.D. to provide his Department sponsored complete pulmonary evaluation. Dr. Hussain examined Claimant on September 11, 2001. A review of Dr. Hussain's report reveals that it is facially defective. He obtained a chest x-ray film and conducted a pulmonary function test ("PFT"), arterial blood gas study ("ABG"), and an EKG. He interpreted the chest x-ray as positive for pneumoconiosis, cardiomegaly, and a history of coronary artery bypass graft. Dr. Hussain noted that the PFT was performed with poor effort, and he determined that the ABG revealed mild hypoxemia. He rendered cardiopulmonary diagnoses of coronary artery disease, congestive heart failure, and pneumoconiosis. Dr. Hussain listed coronary atherosclerosis and dust exposure as the etiologies of his cardiopulmonary diagnoses. On a separate form, Dr. Hussain marked that Claimant suffered from an occupational lung disease arising out of coal mine employment on the basis of "x-ray findings, history of dust exposure." The Sixth Circuit Court of Appeals has held that merely restating an x-ray is not a reasoned medical judgment under § 718.202(a)(4). *Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6<sup>th</sup> Cir. 2000). The Board has also explained that, when a doctor relies solely on a chest x-ray and coal dust exposure history, a doctor's failure to explain how the duration of a miner's coal mine employment supports his diagnosis of the presence or absence of pneumoconiosis renders his opinion :merely a reading of an x-ray . . . and not a reasoned medical opinion." *Taylor v. Brown Bodgett, Inc.*, 8 B.L.R. 1-405 (1985). *See also Worhach v. Director, OWCP*, 17 B.L.R. 1-105, 1-110 (1993)(citing *Anderson v. Valley Camp of Utah, Inc.*, 12 B.L.R. 1-111, 1-113 (1989)(it is permissible to discredit the opinion of a physician which amounts to no more than a restatement of the x-ray reading). Dr. Hussain provided no basis to support his cardiopulmonary diagnosis of pneumoconiosis, even though the section for cardiopulmonary diagnosis requests that the completing physician identify the basis for their diagnosis. Moreover, when he identified the etiology of his cardiopulmonary diagnoses, it is not clear if dust exposure and coronary atherosclerosis each individually contributed to one, two, or all three of his cardiopulmonary diagnoses or if both contributed to all three. His diagnosis of pneumoconiosis is simply not reasoned and documented. Dr. Hussain's diagnosis of an occupational lung disease arising out of coal mine employment was based on his chest x-ray finding and Claimant's history of coal dust exposure. This diagnosis does not constitute a reasoned medical opinion; it is merely his chest x-ray reading.

Dr. Hussain's report fails to credibly address at least one element of entitlement. Thus, Dr. Hussain's examination and report would not amount to a complete and credible pulmonary evaluation that is sufficient to constitute an opportunity to substantiate a claim for benefits under the Act. It appears that the District Director has not completed its adjudicatory burden under § 725.406. As such, this claim should not have been transferred to the Office of the Administrative Law Judges for a formal hearing. *See* § 725.421. Pursuant to the undersigned's authority under § 725.456(e), this claim must be remanded to the District Director, Office of Workers' Compensation Programs for the District Director to complete its adjudicatory duties. Therefore,

**ORDER**

IT IS ORDERED that the claim of John Hall is hereby REMANDED to the District Director to provide John Hall with a complete pulmonary evaluation that comports with the above guidelines.

**A**

THOMAS F. PHALEN, JR.  
Administrative Law Judge